EMPLOYMENT LAW BULLETIN

The Newsletter of **LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.**

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TO OUR CLIENTS AND FRIENDS:

We are pleased to announce that Kimberly Keefer Boone has joined the firm as an associate. Kimberly received her Bachelor's of Arts *magna cum laude* from Huntingdon College and her Juris Doctor, *magna cum laude* from the University of Alabama School Of Law where she was Omicron Delta Kappa, Order of the Coif, Order of The Barristers, Bench and Bar and a senior editor on the University of Alabama Law Review. Kimberly was previously associated with the Birmingham, Alabama firm of Spain & Gillon and will continue with us her practice in the areas of employment discrimination and sexual harassment. We are delighted to have Kimberly practicing with us and hope that you have the opportunity to meet and work with her.

YOU'RE EITHER A WOMAN OR YOU'RE NOT

Susan Simens, a female employee, recently argued to the Federal District Court for the District of Columbia that she was denied a promotion based on her sex notwithstanding the fact that the job she sought was ultimately awarded to another woman. Ms. Simens' attorney argued that the sex of the successful applicant was immaterial, relying on the United States Supreme Court ruling that an age discrimination suit can be maintained by anindividual over 40 which is replaced by another individual over 40 notwithstanding the fact that both are members of the protected class. The district court correctly noted that sex, unlike age, is not relative. Indeed, a 60-year-old individual and a 41-year-old individual are both in the protected classification for age discrimination but clearly not similarly situated. However, all women are equally within the protected classification for sex discrimination. Although at first blush the case seems absurd rather than significant, it is actually an important victory for employers. If the Court had permitted Ms. Simens to maintain her suit, employers would be open to the argument of "I was denied a position based on my sex because I was 'more feminine' or 'less feminine' than the successful applicant of the same gender." The permutations which such a decision would create in the race, religion and national origin arenas are equally unmanageable. Simens v. Reno (Dist. Ct. D.C., 3/24/97).

EASY MONEY

The Small Business Job Protection Act of 1996 included the Work Opportunity Tax Credit. This federal income tax credit encourages employers to hire certain potential employees by providing a federal tax ***credit*** (not deduction) of as much as $2,100 per qualified new worker ($1,050 per qualified summer youth). The number of qualifying employees a company can take credit for is unlimited. In order to qualify for the credit, the employer must prepare an IRS 8850 by the day the job offer is made, together with a ETA Form

9061 "Individual Characteristics Form." These forms must be sent to the Alabama WOTC Unit at the Employment Services Division of the Alabama Department Industrial Relations, within 21 days of the employee's starting work. Employees eligible for the WOTC must be hired before October 1, 1997 and belong to one of the following seven target groups:

(1) The member of a family receiving (or recently receiving) Aid To Families With Dependent Children, Temporary Assistance For Needy Families, or similar assistance.

(2) An 18 to 24 year old resident of a federally designated empowerment zone or enterprise community.

(3) An 18 to 24 year old member of a family that is receiving (or recently receiving) food stamps.

(4) A 16 to 17 year old resident of an empowerment zone or enterprise community hired before September 15, 1997 as a summer youth employee.

(5) A veteran who is a member of a family receiving (or recently receiving) Aid To Families With Dependent Children or Temporary Assistance To Needy Families family or food stamps.

(6) A disabled person who has completed (or is completing) rehabilitative services from the Department of Veterans Affairs or a state government equivalent.

(7) An ex-felon who is a member of a low-income family.

The new employees must work a minimum of 180 days or 400 hours before the employer qualifies for the credit. Summer youth must work a minimum of 20 days or 120 hours before qualifying the employer. Oftentimes, employers offer employment to individuals which qualify the company for the tax relief but fail to take the steps necessary to take advantage of the credit.

IS THERE INDIVIDUAL SUPERVISOR LIABILITY UNDER THE ADA?

The various federal circuit courts of appeal are split on the issue of whether a supervisor can be individually liable for violations of Title VII. This issue of "individual liability" has remained generally unaddressed with regard to the Americans with Disabilities Act. However, in a recent decision, the Federal District Court for the Eastern District of California considered whether there was any individual liability for retaliation against an individual for asserting rights under the Americans with Disabilities Act. The court found that the basic coverage of employers under the ADA was identical to that of Title VII and, therefore, there would be no individual liability. However, the court noted that Section 503, the anti-retaliation provisions of the ADA, specifically state that "no person shall discriminate against any individual." Based on the foregoing language, the district court found that a supervisor could be individually liable for compensatory and punitive damages arising out of the retaliation (but not the underlying discrimination). Ostrach v. University of California (E.D. Calif., 3/17/97).

"TO BE (AN INDEPENDENT CONTRACTOR), OR NOT TO BE"

The 1996 Small Business Job Protection Act prompted the Internal Revenue Service to revise its guidance to agents concerning the employee/independent contractor distinction. The new analysis includes a three factor test: (a) whether the employer filed all federal tax returns (including information returns) for the individuals in question as if they were independent contractors, (b) whether the employer treated all similarly situated individuals as independent contractors, and (c) whether the employer had some reasonable basis for treating the individual in question as a contractor rather than an employee.

Factor (c) can be met by one of three safe harbors: (1) judicial precedent, a private or public ruling from the Service, or a technical advice issued to the taxpayer, (2) a prior audit by the Service, or (3) a long-standing trade practice within the industry of the employer.

Safe harbor (c)(3), a long-standing trade practice, is defined as one which is adhered to by 25% or more of a particular industry. It, however, is unclear how long the practice must have been recognized to be considered "long-standing." In any event, field agents have been directed to make the determination under Factor (c)(3) by (i) examining company records for evidence of why the taxpayer decided to treat the worker as an independent contractor, (ii) interviewing the worker to ascertain whether the employer has stated any reason to him as justifying the selection of independent contractor status, (iii) interviewing key workers in the industry to determine whether the practice in question is prevalent in the industry and the reasons for which the industry adopted this practice, and (iv) considering whether a prudent businessman under similar circumstances would have relied on the "industry practice" element for treating the individual as an independent contractor.

The foregoing analysis does not apply to disputes involving taxes collectible prior to 1997. However, letter rulings and audits which occurred prior to 1997 can be used to satisfy any of the safe harbors of Factor (c).

COURT RULES... FMLA UPDATE

Relying on federal regulations concerning employment laws such as the Family Medical Leave Act is usually a "safe bet." However, sometimes it pays to buck the system. For example, the Family Medical Leave Act is silent on the issue of whether an employer must inform an ineligible employee of their "ineligibility." The regulations, however, state that if a new (ineligible) employee is not notified of his ineligibility for FMLA leave, then he is deemed to be covered. Specifically, 29 C.F.R. § 825.110 deems ineligible employees to be covered by the FMLA if the employer fails to inform such employees of their ineligibility for leave within two business days following the employer's receipt of notice that the employee is in need of or desires leave.

An employer recently tested this regulation in federal district court in Virginia when the obvious occurred: An individual who was not eligible for leave because of insufficient work history notified the employer of an injury which would have otherwise qualified for leave under the Act. The employer failed to notify the employee that he was not generally eligible for leave under the Act. When the employee later found that he was being denied leave, he filed suit. The district court ruled that the Department of Labor's regulations, 29 C.F.R. § 825.110, were fundamentally flawed and, therefore, unenforceable. Specifically, the Court found that the regulation sought to impose coverage of the Act in situations where the statute, 29 U.S.C. § 2611(2)(a), specifically provided that the employee would not be eligible for medical leave in any event. This of course was a victory for employers. We can only hope that as this issue gets presented to district courts in various other federal circuits that this legally sound and employer-friendly position becomes the norm. Wolke v. Dreadnought Marine, Inc. (E.D. Va., 2/18/97).

"WE'RE FROM OSHA, AND WE'RE HERE TO HELP"

Ergonomic design in the workplace can be the basis of an OHSA violation. Indeed, an assessment for such a violation by the Occupational Safety and Health Administration against Pepperidge Farm, Inc. under the Occupational Safety and Health Act's general duty clause was recently reduced. OSHA fined Pepperidge Farms because it claimed that equipment at one of the company's plants was not designed to minimize lifting and other injuries

related to ergonomics. The company appealed the Administration's initial assessment of $1.4 million to an Administrative Judge. The Administrative Law Judge vacated the violations related to equipment design because the Secretary of Labor failed to show that there was a feasible means by which Pepperidge Farms could have abated the alleged hazard. The Administrative Law Judge accordingly reduced the fine to $394,000 which represented the penalties related to the record-keeping violations which remained undisturbed by the appeal. The Secretary of Labor filed for and received discretionary review of the Administrative Law Judge's decision by the Commission. In April of this year, the Commission reduced the record-keeping violations to $289,000 but reimposed $20,000 of the fine related to the repetitive motion violations.

The Occupational Safety and Health Administration's entry into this area of growing litigation increases an employer's "ergonomic" exposure. Now an employer is not only at risk of private suits for injuries but the Occupational Safety and Health Administration can "make your day" by assessing a fine for not taking affirmative steps to maximize workplace ergonomics.

YOU ARE NOT DISABLED IF YOU CAN KEEP "PACE" WITH THE OTHER WORKERS

The federal Court of Appeals for the Fifth Circuit recently ruled that an employee's reliance on a pacemaker did not constitute a disability covered by the Americans with Disabilities Act. Specifically, the Court was faced with an ADA case in which the Plaintiff could not perform his job because electrical equipment in the vicinity of his job location would interfere with his recently installed pacemaker. The Plaintiff argued that he was disabled and that the company was required to provide him with a job which he could perform notwithstanding the pacemaker and having similar privileges and pay. The case, therefore, involved two distinct questions for the court's review. First, was the employee in question disabled within the meaning of the Americans with Disabilities Act and, second, was his request for reassignment a reasonable accommodation within the Act. The Court answered both of the questions in the negative.

With regard to the employee's allegations of disability, the court reasoned that the Plaintiff's inability to work in certain areas was not a restriction of a major life activity. Specifically, although the pacemaker prevented the employee from performing his prior job, the vast majority of the other positions available at the plant in question or in the work force in general remained available to him. The Court of Appeals went on to evaluate whether the accommodation which the Plaintiff sought—reassignment to a job of his choosing—was reasonable. To reassign the individual in the manner he requested would have required the employer to violate the terms of its collective bargaining agreement with the local union which represented its production employees. The Court correctly concluded that the Americans with Disabilities Act does not require the employer to provide an accommodation which would constitute a violation of otherwise neutral terms of a collective bargaining agreement. Foreman v. Babcock & Wilcox (5th Cir., 5/22/97).

HIPAA UPDATE

We distributed a copy of the firm's overview of the Health Insurance Portability and Accountability Act and accompanying regulations with last month's newsletter. Since that time, we have received a number of inquiries about how days spent in a waiting or affiliation period are to be counted in determining someone's creditable coverage. Days spent in a waiting or affiliation period will not be counted as "uncovered days" for purposes of determining whether the individual has experienced a break in coverage of 63 or more days. Any days of coverage occurring prior to a 63-day break in coverage are not counted as creditable

days. Although waiting and affiliation period days are not counted for the purpose of determining the existence of a 63-day break in coverage, those days do not count as creditable days of coverage. Questions concerning this or any other part of the HIPAA should be directed to Terry Price, David Skinner or any of the other lawyers at the firm.

DID YOU KNOW...

. . .that the Commerce Department revised the first quarter of 1997 gross domestic product estimates to reflect a 5.8% annual rate? This is the highest quarterly increase since the fourth quarter of 1987 which rang in at 6%. Of course, the government analysts expect the second quarter of 1997 to reflect a slowdown to compensate for the remarkable first quarter.

. . .that the inability to lift a preset minimum weight is not necessarily a disability covered by the Americans with Disabilities Act? One court has ruled that a worker's inability to lift 50 pounds because of a bad back was insufficient to trigger protection under the ADA. Kirkendall v. United Parcel Service, Inc., (W.D. N.Y., 5/20/97). The United States Court of Appeals for the Tenth Circuit similarly rejected an employee's claim that his "bad back" entitled him to protection under the ADA. Indeed, such an injury does not substantially limit a major life activity. Burgard v. SuperValu Holdings, Inc. (10th Cir., 5/27/97).

. . .that a recent independent survey of 16,000 businesses nationwide indicates that the third quarter of 1997 should see the most extensive hiring increase since 1988? Thirty percent of the businesses responding to the survey said that they would be searching for additional workers during the third quarter while only five percent were planning cutbacks. The size of the increase suggests that it is not entirely attributable to seasonal factors. Rather, businesses appear to be attempting to fill employment shortfalls carried over from previous months.

. . .that our federal court of appeals has ruled that homosexual harassment violates Title VII of the 1964 Civil Rights Act? The court found that a homosexual male supervisor's demand for sexual favors from a male subordinate was actionable as sex discrimination violative of Title VII. The Eleventh Circuit was the most recent Federal Court of Appeals to address this issue. The Court's conclusion is the current majority position of those courts of appeals which have reviewed the question. Fredette v. BBP Management Associates (11th Cir., 5/22/97). The Fifth Circuit was the first court of appeals to address the issue and the only one to decide to the contrary and deny any right of recovery under Title VII for same gender sexual discrimination.

The Employment Law Bulletin is prepared and edited by Richard I. Lehr and David C. Skinner. Please contact Mr. Lehr, Mr. Skinner, or another member of the firm if you have questions or suggestions regarding the Bulletin.

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